

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.2398/Del/2016
Assessment Year: 2008-09

ACIT,
Central Circle-18,
New Delhi.

Vs Subhash Dabas,
Prop. Tirupati Construction Co.,
C/o Tirupati Bldgs. & Offices Pvt. Ltd.,
Plot No.3, Dwarka City Centre,
Sector-10, Dwarka,
New Delhi.
PAN: AAGPD6947F

CO No.221/Del/2016
(ITA No.2398/Del/2016)
Assessment Year: 2008-09

Subhash Dabas,
Prop. Tirupati Construction Co.,
C/o Tirupati Bldgs. &
Offices Pvt. Ltd.,
Plot No.3, Dwarka City Centre,
Sector-10, Dwarka,
New Delhi.
PAN: AAGPD6947F

Vs. ACIT,
Central Circle-18,
New Delhi,.

(Appellant/Cross Objector)

(Respondent)

Assessee by	:	Shri Mahavir Singh, Advocate
Revenue by	:	Ms Nidhi Srivastava, CIT, DR
Date of Hearing	:	21.08.2019
Date of Pronouncement	:	02.09.2019

ORDER

PER R.K. PANDA, AM:

The appeal filed by the Revenue is directed against the order dated 22nd February, 2016 of the CIT(A)-27, New Delhi relating to assessment year 2008-09.

The assessee has also filed Cross Objections against the appeal filed by the Revenue. For the sake of convenience, these were heard together and are being disposed of by this common order.

2. The Revenue in the grounds of appeal has challenged the order of the CIT(A) in deleting the addition of Rs.15,18,06,000/- made by the Assessing Officer u/s 68 of the IT Act on account of unsecured loans and Rs.78,05,000/- made by the Assessing Officer u/s 2(22)(e) of the IT Act.

3. Facts of the case, in brief, are that the assessee is an individual and is the proprietor of M/s Tirupati Construction Company engaged in the business of civil contractors. A search u/s 132 of the IT Act was undertaken at the business premises and residential premises of the assessee on 14th September, 2010. The case of the assessee was centralized u/s 127 of the Act, vide order dated 18th October, 2012. In response to notice u/s 153A, the assessee submitted that the original return filed u/s 139(1) on 27th September, 2008 declaring total income of Rs.4,09,98,148/- be treated as return in response to notice u/s 153A. During the course of assessment proceedings, the Assessing Officer noted that the assessee has received unsecured loan of Rs.15,18,06,000/- from 20 parties as per para 4 of the assessment order. Since the assessee, according to the Assessing Officer, failed to discharge the three ingredients of the provisions of section 68 of the Act and no reply was received in response to notice u/s 133(6), the Assessing Officer held that the unsecured loan of Rs.15,18,06,000/- remained unexplained. Applying the

provisions of section 68 of the IT Act, the Assessing Officer made the addition of Rs.15,18,06,000/-.

4. The Assessing Officer further noted that the assessee is the director and shareholder of the company, named Tirupati Constwell Pvt. Ltd. having more than 10% share of this company. Since the company has granted loans and advances to the assessee to the tune of Rs.78,05,000/-, the Assessing Officer asked the assessee to explain as to why the same should not be treated as deemed dividend as per the provisions of section 2(22)(e) of the IT Act. The reply of the assessee that the company is doing business with the assessee and in order to facilitate payments to the parties and to carry out business for the company, he had transferred the funds to himself and made the payments to various parties and that no payment has been made for the individual benefit of the director was rejected by the Assessing Officer on the ground that it is an afterthought to escape the imposition of deemed dividend tax. Rejecting the various explanations given by the assessee and distinguishing the various decisions cited before him, the Assessing Officer made addition of Rs.78,05,000/- to the total income of the assessee under the provisions of section 2(22)(e) of the IT Act. The Assessing Officer also made addition of Rs.76,000/- being 1/5 of the expenses of repair and maintenance and depreciation on motor car on estimate basis being for probable personal use.

5. In appeal, the Id.CIT(A) deleted the addition of Rs.15,18,06,000/- made by the Assessing Officer u/s 68 of the Act. He also deleted an amount of Rs.60 lakhs

out of Rs.78,05,000/- made by the Assessing Officer u/s 2(22)(e) of the IT Act. He, however, sustained the addition of Rs.76,000/- made by the Assessing Officer.

6. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal raising the following grounds:-

“1. That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting Rs.15,18,06,000/-which was added to the income of the assessee u/s 68 on account of unsecured loans.

2. That the commissioner of Income Tax (Appeals) has erred in law and on facts in deleting Rs. 15,18,06,000/- received by the assessee as unsecured loan, without appreciating the fact that the assessee has failed to prove the creditworthiness of the loans givers/providers.

3. That the commissioner of Income Tax (Appeals) has erred in law and on facts in deleting of Rs. 15,18,06,000/- by ignoring the fact that the AO has clearly commented in the Remand report that the perusal of bank statement showed circulatory transactions, typical of entry businesses and loan givers don't have the capacity to advance such loans.

4. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting Rs. 60,00,000/-(out of Rs.78,05,000/-) by treating as director's remuneration which was added to the income of the assessee as Deemed Dividend u/s 2(22)(e).

5. That the commissioner of Income Tax (Appeals) has erred in law and on facts in accepting the assessee plea of treating Rs. 60,00,000/- as director's remuneration without realizing the fact that the assessee never took this grounds in assessment proceedings and the department never got the chances/opportunity to rebut or examine the claim of the assessee.

6. That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in admitting additional evidences under Rule 46A of Income Tax rules.

7. That the commissioner of Income Tax (Appeals) has erred in law and on facts by neither conducting her own independent and effective inquiry nor giving a direction as per subsection 4 of section 250, Income Tax Act and ignoring Honble Delhi High Court's judgment in the case of “The Commissioner of Income Tax - II Vs M/s Jansampark Advertising and Marketing (P) Ltd.”

8. (a) The order of the Ld. CIT(Appeals) is erroneous and not tenable in law and on facts.

(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”

6.1 The assessee has raised the following grounds in the Cross Objection:-

“1. That the appeal is not maintainable, particularly in view of Board’s Instructions issued from time to time.

2. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in confirming the addition of Rs. 18,05,000/- paid to the appellant by the payer company, treating same as deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961.

3. The Appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”

6.2 The assessee has raised the following additional ground in the Cross Objection:-

“The Ld. CIT (A) has erred in law as well on facts in confirming additions made by the Ld.A.O. in assessment order dated 28/03/2013 in the circumstances where earlier assessment stood already completed as return of income filed on 27/09/2008 attained finality on 30/09/2009 and no incriminating material was found during search and seizure operation conducted on 14/09/2010 till 20/11/2010 in view of judgement of the Hon’ble High Court of Delhi in case of CIT vs Kabul Chawla.”

7. The ld. counsel for the assessee, at the outset, submitted that the additional ground raised by the assessee is purely legal and no fresh facts are required to be investigated and, therefore, in view of the decision of the Hon’ble Supreme Court in the case of *NTPC Ltd. vs. CIT, 229 ITR 383 (SC)*, the additional ground should be admitted.

8. After hearing both the sides and considering the fact that all material facts necessary for adjudication of the additional ground are already on record and no new facts are required to be investigated and the additional ground is a legal ground, therefore, the same is admitted for adjudication.

9. The ld. counsel for the assessee, at the outset, submitted that no incriminating material was found during the course of search and no addition has been made in the assessment order on the basis of any incriminating material found during the course of search. Therefore, in view of the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla*, reported in 380 ITR 573, no addition could have been made for the impugned assessment year. Referring to the decision of the coordinate Bench of the Tribunal in assessee's own case vide *ITA No.2330/Del/2016 and CO No.223/Del/2016, order dated 30th July,2019 for assessment year 2007-08*, he submitted that under identical circumstances the appeal filed by the Revenue was dismissed. He accordingly submitted that this being a covered matter the appeal filed by the Revenue should be dismissed and the CO filed by the assessee should be allowed.

10. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer.

11. We have considered the rival arguments made by both the sides and perused the orders of the Assessing Officer and CIT(A). We have also considered the

decision relied on by the ld. counsel for the assessee. We find from the body of the assessment order that there is no mention of any incriminating material found during the course of search conducted in the business and residential premises of the assessee on 14th September, 2010. Both the additions made by the Assessing Officer which are subject matter of challenge by the Revenue are not based on any incriminating material found during the course of search. We, therefore, find merit in the argument of the ld. counsel for the assessee that in absence of any incriminating material found during the course of search no addition can be made in the hands of the assessee in the order passed u/s 143(3)/153A in a completed assessment. We find the coordinate Bench of the Tribunal in assessee's own case in the immediately preceding assessment year, vide *ITA No.2330/Del/2016 and CO No.223/Del/2016, order dated 30th July, 2019*, while dismissing the appeal filed by the Revenue and allowing the CO filed by the assessee has observed as under:-

“8. We have heard both the parties and perused the material on record. We find that in the case of the assessee search under section 132 of the Act was conducted on 14/09/2010 and consequently, notice under section 153A of the Act was issued, which was duly complied by the assessee on 21/01/2013. The assessee submitted that assessment under section 143(3) of the Act was already completed on 31/12/2008 at total income of Rs.5,92,80,820/- pursuant to earlier search initiated on 01/06/2006. The Assessing Officer in the present assessment proceedings made addition of Rs.1,42,69,262/- on account of deemed dividend under section 2(22)(e) of the Act. Aggrieved, the assessee filed appeal before the Ld. CIT(A) and filed detailed submissions challenging the legality of the assessment as well as merit of the addition. The Ld. CIT(A) partly allowed the amount of Rs.60 lakh received by the assessee as salary and upheld the balance amount of Rs.82,69,262/-.

9. In view of the decision of the Hon'ble Delhi High Court in the case of *Kabul Chawla(supra)*, if the two conditions of no incriminating material and completed assessments are satisfied, no addition would have been made in the assessment proceeding under section 153A of the Act. In the instant case,

search has been conducted on 14/09/2010 and the assessment for the year into consideration was completed on 31/12/2008 under section 143(3) of the Act. Further, in the impugned assessment completed there is no reference of any incriminating material for making addition under section 2(22)(e) of the Act. In view of both the conditions being satisfied, we are of the considered opinion that no addition could have been made in the instant assessment in view of the decision of the Hon'ble Delhi High Court in the case of *Kabul Chawla (supra)*. Accordingly, the additional ground raised by the assessee is allowed.

10. In the result, the appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is allowed.”

12. Since, admittedly, in the instant case, no assessment was pending on the date of search since the period for issue of notice u/s 143(2) had already expired and the addition is not based on any incriminating material found during the course of search, therefore, in view of the decision of the Hon'ble Delhi High Court in the case of *Kabul Chawla (supra)*, we hold that no addition could have been made in the instant case for the impugned assessment year. We, therefore, allow the additional ground raised by the assessee. Accordingly, the appeal filed by the Revenue is dismissed and the CO filed by the assessee is allowed.

13. In the result, appeal filed by the Revenue is dismissed and the CO filed by the assessee is allowed.

The decision was pronounced in the open court on 02.09.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated:02nd September, 2019

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Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi